NTSB Order No.
EM-98

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON,D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 10th day of February 1983

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

EDWARD JAMES PITTS, Appellant.

Docket No. ME-91

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision (Appeal No. 2272) affirming a probationary suspension of his mariner's license (No. 468276). The suspension had been ordered by Administrative Law Judge Michael E. Hanrahan, in a decision and order dated March 9, 1981, following an evidentiary hearing, on May 22, 1980, on charges of negligence and misconduct arising out of appellant's operation, on February 19, 1980, of a flotilla consisting of a tug, the M/V Morania #16, and a seagoing tank barge, the Morania #400.[1] The Commandant concluded that while the charges properly had been found proved, a lesser sanction was warranted. He therefore modified the law judge's order to provide for a suspension of appellant's license for 3 months on 12 months' probation[2] On appeal, the appellant challenges the evidentiary basis for the finding of negligence and the legal basis for the finding of misconduct.[3] We turn first to the issue of appellant's alleged negligence.

The finding of negligence in this case does not flow from any evidence produced concerning the actual manner in which the appellant navigated his tug and barge in Charleston Harbor on the date in issue. Rather, it derives exclusively from the fact that

---

[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

[2]The law judge had also imposed an outright suspension of one month.

[3]The Coast Guard has filed a reply brief opposing the appeal.

during the course of his navigation the barge allided with a South Carolina Ports Authority pier. Appellant does not challenge the law judge's application here of the admiralty law doctrine that a ship's allision with a stationary object raises a rebuttable inference or presumption of negligence in the ship's navigation. He does assert, however, that he negated the inference in this case. In our judgment, the appellant did not.[4]

Appellant attributes the allision to the fact that a dredge was located near the south end of Town Creek Lower Reach at a point where he should have begun a slight turn to the left to shape up his course to enter the channel. The presence of the dredge and its pipeline forced appellant to delay his turn until he was north of the dredge where a somewhat sharper turn to line up with the channel was necessary. It appears that after appellant initiated the turn the bow of the barge commenced a sheer or swing to port which he was unable to arrest and which resulted in the striking of the pier. Appellant's counsel asserts on brief that:

> "But for the anchored dredge with its pipeline extended into the channel which embarrassed his navigation, Captain Pitts would have lined up on the entrance to Town Creek Lower Reach further south in Customhouse Reach, thus minimizing the effect of the current on the Tug's port quarter." App. Br. at 30.

In our view the possibility that the allision might not have occurred had the dredge not been located in or near the channel's mouth compels no conclusion as to the degree of care appellant exercised in navigating his flotilla into a channel where a dredge was so positioned. The issue here was not whether the appellant could have avoided an allision with the pier once the sheer began, but whether the sheer developed as a result of faulty navigational judgment. Appellant has simply provided an explanation for the event which is essentially neutral on that issue. He does not assert that he experienced currents of a magnitude or from a direction he could not or should not have reasonably foreseen would exist where he in fact made his turn; that the position of the dredge and pipeline or any factor relative to vessel draft or channel depth and width precluded or even made inadvisable a more gradual turn than he attempted to make; or that the possibility

---

[4]Compare Commandant v. Jahn, NTSB Order EM-88, at 2, wherein we held that the appellant had "adequately rebutted the presumption of negligence" by his "showing that the presumptively blameworthy occurrence [i.e., his ship's allision with a navigation beacon and subsequent grounding] could have resulted from factors other than his alleged negligent operation"; namely, uncharted shoaling and possible oversteering by the helmsman.

that the barge would sheer to port if a turn north of the dredge and pipeline were made was not fairly apparent until it was too late to avoid the consequences of such a turn. In short, appellant has not even alleged, much less made a sufficient showing with respect to, any circumstance that would overcome in this case the presumption of negligence the allision with the pier created.[5]

The charge of misconduct upheld by the law judge is predicated on the following specification:

> "In that you while serving as operator aboard the tug Morania #16 pushing T/B Morania #400, under authority of the captioned documents, did on 19 February 1980 wrongfully exceed the scope of your license by navigating from the high seas to inland waters, to wit, Charleston Harbor, S.C., without having onboard a properly licensed pilot as required by 46 U.S.C. 364."

As to this charge the appellant contends, for a variety of reasons, that his uninspected towing vessel ("UTV") operator's license, issued pursuant to 46 U.S.C. §405(b)(2), fully authorized him to pilot both the tug and the barge, not just the tug, on the inland waterway at issue. Appellant further contends that the Coast Guard's position that a federal pilot was required for the barge represents a new interpretation of federal pilotage laws which has not previously been made known or applied to UTV operators. He submits that a proceeding on the charge of misconduct is therefore barred by the Coast Guard's failure, under basic principles of fairness and procedural due process under the Administrative Procedure Act and the U. S. Constitution, to provide prior notice of its position as to what the law required. We find ourselves, for reasons set forth below, in agreement with the appellant in this latter connection.

Pursuant to 46 U.S.C. §364 "***every coastwise seagoing steam vessel... shall, when under way, except on the high seas, be under

---

[5]Our conclusion is unaffected by the law judge's effort to determine, from the dimensions of a mark the appellant placed on a chart of the harbor (See C.G. Exh. 8), whether he should have been able to navigate around the dredge and pipeline without incident. Although the law judge's views in this respect must be deemed merely speculation, given the fact that appellant's mark was not intended to be exact or to scale, they do not impugn the finding that the relevant charge was adequately demonstrated by the evidence underlying the presumption of negligence which, as explained above, was not rebutted.

the control and direction of pilots licensed by the Coast Guard."[6] Appellant maintains that he was a "pilot licensed by the Coast Guard" by virtue of the license he received under regulations implementing 46 U.S.C. §405, a statute enacted many years after the pilotage requirement set forth in section 364.[7] He points out, among other things, that section 405(b)(1)(c) defines "towing vessel" as "a commercial vessel engaged in or intended to engage in the service of towing ***." This, according to appellant, reflects a congressional intention that the UTV operator's license cover both a tug and its tow.[8]

We find it unnecessary to attempt to resolve here the conflicting views of the parties as to the scope and nature of the license Congress intended the Coast Guard to issue under Section 405.[9] We think the relevant inquiry is whether the appellant

---

[6]Under 46 U.S.C. 391a(3), a tank barge that has on board liquid cargo in bulk which is flammable or combustible, or oil of any kind or in any form, or a designated hazardous substance is a "steam vessel"; if it is also "seagoing" it is subject, inter alia, to the provisions of 46 U.S.C. 364.

[7]Section 405(b)(2), Title 46, U.S.C., provides, in relevant part, that: "An uninspected towing vessel in order to assure safe navigation shall, while underway, be under the actual direction and control of a person licensed by the Secretary to operate in the particular geographic area and by type of vessel under regulations prescribed by him." The geographic areas for which appellant's UTV operator's license is endorsed includes "Oceans not more than 200 miles offshore, Inland Waters of the United States, and the Great Lakes, not including the Western Rivers" (App. Br. at 3).

[8] Appellant asserts that the incentive for enactment of Section 405 was perceived safety problems flowing from the absence of licensed personnel in charge of tugs towing barges which might be carrying large quantities of hazardous cargo, not the absence of such personnel on tugs when they were not engaged in such towing operations.

[9] The Commandant did not, in his decision, address appellant's numerous arguments that the law judge has applied an erroneous interpretation of the relevant licensing laws. Instead, he found that (Dec. at 4) the decision in Moran Maritime Associates v. U.S. Coast Guard, 526 F. Supp. 335 (D.D.C. 1981) aff'd 679 F.2d261(C.A.D.C. 1982), was dispositive of appellant's statutory arguments. While that case did involve the similar issue of the authority of a licensed master or a mate to pilot both a tug and a seagoing tank barge, the authority of a UTV operator under section

fairly may be deemed to have had notice of the Coast Guard's position, as articulated in this case, that a UTV operator's license does not authorize the holder to act as pilot of a seagoing tank barge in inland waters.[10] We must answer that question in the negative.

There is nothing in the language of Section 405 or in the regulations promulgated by the Coast Guard to implement it (see 46 CFR 10.16 et seq.) to alert a UTV operator that some additional authorization or license is required to permit operation of a tug and a seagoing tank barge in inland waters in order to comply with federal pilotage laws. This circumstance is relevant because, as the Coast Guard has pointed out, Section 405 crated for the tow boat industry a new licensing authority separate from the master/pilot system. See, e.g., 38 FR 5746 (March 2, 1973). We recognize that this departure from the traditional "master/mate and pilot concept" (id.) was intended to supplement rather than supplant existing. licensing laws. At the same time, however, the legislative and regulatory history make the precise impact of the new law on the pre-existing pilotage requirement imposed by Section 364 far from self-evident. We think it was incumbent on the Coast Guard to eliminate this ambiguity, through some public indication of its apparent view that a section 405 license does not authorize pilotage of a seagoing tank barge in tow in inland waters, before seeking to enforce that position with respect to licensees who not only have not been apprised of it, but who also have apparently been permitted for many years to operate exactly as the appellant here[11] For these reasons the charge of misconduct must be dismissed.[12]

405(b) was not at issue in the case. We therefore do not share the Commandant's view that Moran was dispositive of any of the issues raised by respondent.

[10] In this connection we note the law judge's finding that "there is absolutely no evidence that [appellant's alleged misconduct] was willful or intentional" (Decision and Order at 16).

[11]Section 405(b) became effective in 1973. The Coast Guard has not challenged the appellant's assertion that this is the first time a disciplinary proceeding has been instituted against a UTV operator on facts such as those presented in this case.

[12]Our dismissal of this charge makes it unnecessary for us to determine whether, as appellant urges, the Coast Guard's proceeding on the misconduct charge must be invalidated for its failure to comply with the requirements of 5 U.S.C. §558(c). That section states, inter alia, that an agency action to withdraw, suspend,

Our dismissal of the two charges in this case dictates a modification of the Commandant's suspension order. In this respect we note that both the law judge and the Commandant apparently found that appellant's spotless prior record spanning thirty years of maritime employment warranted a lesser sanction for both the negligence and misconduct charges than would appear to be otherwise called for under the "Scale of Average Orders."[13] Consistent with their views on the matter and our own belief that the misconduct charge was the more serious of the two violations alleged, we believe that the proper sanction should be an order of admonition rather than a probationary suspension. The Commandant's order will be so modified.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal is denied in part and granted in part, and

2. The order suspending appellant's license for 3 months on 12 months' probation is hereby modified to provide that an admonition be entered against the appellant for negligent operation.

BURNETT, Chairman, GOLDMAN, Vice Chairman, McADAMS, BURSLEY, and ENGEN, Members of the Board, concurred in the above opinion and order.

---

revoke or annul a license "is lawful only if, before the institution of agency proceedings therefor, the licensee has been given-(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements" (emphasis added).

[13]46 CFR 5.20-165.